

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY GOXEM,

Defendant-Appellant.

UNPUBLISHED

September 15, 2000

No. 213329

Oakland Circuit Court

LC No. 97-156082-FC

Before: Owens, P.J., and Jansen and R. B. Burns*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was subsequently sentenced to ten to twenty years' imprisonment for the first-degree criminal sexual conduct conviction and ~~7 1/2~~ 15 years' imprisonment for the second-degree criminal sexual conduct conviction. We affirm defendant's convictions, but remand for correction of the judgment of sentence.

Defendant's daughter, who was ten years old at the time of the trial, testified during trial that defendant had touched her in her "potty area" with his hand. The touching occurred both over the child's clothing and while the child was naked, on more than six occasions. Defendant also digitally penetrated the child. The child disclosed the sexual touching during a psychological evaluation.

Defendant first argues that the prosecutor violated his due process rights by failing to preserve a record of the interviews with the child victim by the social worker and a psychologist. Defendant did not raise this issue in the trial court. Pursuant to *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), the standard of reviewing a forfeited issue, whether constitutional or nonconstitutional error, is whether the defendant has shown a plain error affecting substantial rights. "Failure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown." *People v Hunter*, 201 Mich App 671, 677; 506

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

NW2d 611 (1993). Defendant has the burden of showing that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

Defendant cannot establish that the prosecution acted in bad faith when it failed to preserve a record of the interviews. The evidence shows that there was no reason for the prosecution to anticipate that the child would ultimately disclose instances of inappropriate touching. The child denied the allegations of sexual abuse when she was placed in foster care and did not disclose the sexual touching, despite numerous subsequent interviews. The child's statement, that defendant inappropriately touched her, was made during the course of an interview that was conducted to assist the court in determining the long-term planning and care of defendant's children. The evidence does not indicate that the prosecutor's office was involved with this interview. Furthermore, as noted by the prosecution, there is no statutory requirement that investigative interviews with children be taped. Therefore, defendant cannot establish that the prosecution acted in bad faith by failing to record the interviews with the child victim.

Defendant next argues that the trial court abused its discretion when it admitted the child's hearsay statement that was made to Ann Wiersma, a clinical psychologist for the Oakland County Family Court. Defendant contends that the statement was not admissible under MRE 803A. MRE 803A provides a "tender age exception" to the general rule that hearsay statements are not admissible. *People v Dunham*, 220 Mich App 268, 271; 559 NW2d 360 (1996); MRE 802. MRE 803A provides in relevant part:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;
- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- (4) the statement is introduced through the testimony of someone other than the declarant.

We conclude that Wiersma's testimony concerning the child's disclosure of the sexual touching was not admissible under MRE 803A because the child's statement was not spontaneous. The evidence established that, before her disclosure, the child had been asked on numerous occasions about the occurrence of any inappropriate sexual touching. Velma Coleman, a case worker for Oakland Family Services, testified that the child was interviewed at Care House following a medical examination that indicated possible sexual abuse. During the interview, the child was asked if there had been inappropriate touching or sexual contact. The child was also interviewed by Doctor Gordon, at the

juvenile court psychological clinic, at which time she was asked if there had been any sexual abuse or inappropriate sexual touching. The child spoke with Mary Kay Neumann, who was with the prosecutor's office, three or four times about defendant touching her. One year later, the child was again interviewed at Care House, at which time she said that defendant had touched her genitals with his hand. Wiersma testified that the child's statement was in response to questions of whether anyone had ever given the child "bad touches." Given the fact that the child had been asked on more than one occasion about inappropriate touching, it cannot be said that the child's ultimate disclosure was spontaneously made.

Nevertheless, we conclude that the trial court's erroneous admission of Wiersma's testimony regarding the child's disclosure of the touching was harmless. The erroneous admission of evidence should not be reversed when the error was harmless. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); MCR 2.613(A). Whether error was harmless is determined by "assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Lukity* at 495. The defendant bears the burden of establishing that the error resulted in a miscarriage of justice. *Id.*

The untainted evidence showed that defendant inappropriately touched the child. The child testified that defendant touched her in her "potty area" with his hand. The touching occurred on more than six occasions, before and after her eighth birthday. When defendant touched the child on top of her clothes, his hand moved back and forth. Defendant also touched the child at times when she was not clothed. Defendant told the child to take her clothes off and lie down, at which point he placed his hand inside her "potty."

In addition to the child's testimony, Doctor Garfield testified that he evaluated the child's total body and discovered redness to the vaginal area and a small hole in the hymen. The hole could have been indicative of sexual penetration and consistent with digital penetration. Assessing Wiersma's testimony regarding the child's disclosure of the touching in the context of the above evidence, it is not more probable than not that a different outcome would have resulted if Wiersma's testimony had been excluded. Therefore, the error was harmless and does not require reversal.

Defendant's final argument is that his sentences were transposed on the judgment of sentence. The judgment of sentence indicates that defendant was sentenced to ten to twenty years for the second-degree criminal sexual conduct conviction and 7 $\frac{1}{2}$ to 15 years for the first-degree criminal sexual conduct conviction. We remand the matter for the limited purpose of correcting this clerical error in the judgment of sentence.

Defendant's convictions are affirmed and the case is remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Kathleen Jansen

/s/ Robert B. Burns